

1 Comcast doesn't serve, can you use DIRECTV's  
2 demand that it faces in that market as a proxy  
3 for Comcast demand for that market, and the  
4 answer is no. I grant you that.

5 BY MR. SCHMIDT:

6 Q And the Massie case that you  
7 referred to, in that case you said that the  
8 judge looked to in-region rivals of Comcast,  
9 is that right - or rather of Time Warner?

10 A Correct.

11 Q But the judge also looked to the  
12 adjacent cable companies like Charter and  
13 MediaCom, didn't he?

14 A My recollection from the order is  
15 that he rejected - he rejected Time Warner's  
16 insistence for the judge to avert his eyes  
17 from the carriage decisions of DIRECTV and  
18 EchoStar, because allegedly those guys had  
19 different business models. And the judge  
20 said, no, the in-region rivals are the most  
21 important ones. And in fact I quote that  
22 sentence back in my testimony.

1           Q       But he did look when doing the  
2 price analysis for example at both Charter and  
3 MediaCom, didn't he? As well as the in-region  
4 rivals?

5           A       He only looked - he followed my  
6 advice on the phase two, and he looked at only  
7 those contracts between third party payers,  
8 actual contracts. So to the extent that these  
9 cable guys that you are citing have entered  
10 into an agreement with Massing, he would have  
11 looked at those, yes.

12          Q       And you were involved in this  
13 case. He did look at those, didn't he?

14          A       I can't remember all the contracts  
15 that Massing had, but I'll take your word for  
16 it that they had contracts with those adjacent  
17 cable operators.

18          Q       Okay.

19                   MR. SCHMIDT:   Nothing else, Your  
20 Honor.

21                   JUDGE SIPPEL:   That's it?

22                   Mr. Schonman, thank you, sir.

1 MR. SCHONMAN: I'm sorry to hold  
2 you up.

3 JUDGE SIPPEL: You are not  
4 holding anyone up.

5 MR. SCHONMAN: I know everyone is  
6 getting hungry for lunch.

7 Dr. Singer, my name is Gary  
8 Schonman, I am co-counsel for the Enforcement  
9 Bureau. And you will have to excuse some of  
10 my questions. They are probably going to be  
11 rather basic.

12 But I have trouble balancing a  
13 checkbook, much less understanding Ph.D.  
14 economics.

15 There was some discussion earlier  
16 about housing and crabs. And I think the  
17 discussion by and large focused on why people  
18 did not purchase certain items. And is it  
19 fair to say from your experience and your  
20 expertise that a price is not necessarily the  
21 only criteria for deciding not to buy  
22 something like a house?

1                   THE WITNESS:   Price is not the  
2   only factor that goes into a housing decision,  
3   that is correct.

4                   MR. SCHONMAN:   Might be the wrong  
5   size house?

6                   THE WITNESS:   Might be the wrong  
7   neighborhood.

8                   MR. SCHONMAN:   Crabs might be the  
9   wrong size crabs?   Not hungry enough?

10                  THE WITNESS:    Sure.

11   CROSS-EXAMINATION BY COUNSEL FOR THE FCC

12                  BY MR. SCHONMAN:

13                  Q       Okay.   With regard to the chart  
14   which is Enterprise Exhibit 192, there was  
15   some discussion earlier about carriers, MVPDs  
16   that did not - that do not carry the NFL  
17   Network.   Do you have any - are you able to  
18   conclude why those companies do not - why  
19   those companies decided not to carry the NFL  
20   Network?

21                  A       I can't pin it down.   I can offer  
22   theories that are consistent with their

1 decision not to carry it.

2 Q Do you have any personal knowledge  
3 as to why the companies decided not to carry  
4 the NFL Network?

5 A Personal knowledge, beyond what  
6 I've read say in Paul Tagliabue's declaration,  
7 have I interviewed Time Warner and asked them?

8 Q Correct.

9 JUDGE SIPPEL: When you say his  
10 declaration, you mean his testimony?

11 THE WITNESS: His deposition  
12 testimony.

13 JUDGE SIPPEL: Okay.

14 BY MR. SCHONMAN:

15 Q Just a general question: do you  
16 have any personal knowledge as to why the  
17 various companies that do not carry the NFL  
18 Network decided not to carry the NFL Network?

19 A If by person you mean, did I  
20 interview them, I did not.

21 Q Correct. As an economist, can you  
22 make any observations, any inferences, for why

1     these companies may have decided not to carry  
2     the NFL Network?

3             A        Sure.

4             Q        And what would those inferences  
5     be?

6             A        I can think of two that are vying  
7     in my mind anyway as candidates. One is pro-  
8     competitive, and the other is anti-  
9     competitive.

10            The pro-competitive one is that  
11     whatever price they were - whatever price NFL  
12     was ultimately willing to grant them at the  
13     end of the negotiation exceeded their  
14     willingness to pay. That is one possibility.

15            Q        What are others? Any others?

16            A        Yeah, there is an important other  
17     one that I keep putting out there based on my  
18     reading of Paul Tagliabue's deposition, and  
19     the reason why it struck me is that it was  
20     consistent with all this indirect evidence  
21     that I was bringing forward in the economics  
22     literature about how cable operators make

1 their decision vis-a-vis independent networks,  
2 jointly.

3           What I read Paul Tagliabue - he is  
4 the former commissioner of the NFL - when I  
5 read his deposition, what strikes me is when  
6 he says that Brian Roberts, who is the CEO of  
7 Comcast, when he issues the threat, he doesn't  
8 say if you don't give me the games exclusive  
9 on Versus then I'm going to tier you. He says  
10 that the cable industry is going to get you;  
11 cable industry is going to get you.

12           And then later on in the  
13 deposition Mr. Tagliabue says that Comcast has  
14 special relations with Time Warner, and they  
15 can use them to do good things and they can  
16 use them to do bad things.

17           So that and not by itself that in  
18 conjunction with all the other evidence that  
19 is out there that the vertically integrated  
20 cable operators make carriage decisions  
21 jointly as opposed to independently, caused in  
22 my mind a viable alternative hypothesis as to

1     why Time Warner is not carrying NFL Network.

2                 Now despite all that, despite -

3                 JUDGE SIPPEL:    You didn't finish  
4     before.   What would it be?

5                 THE WITNESS:    The thought is that  
6     - the conclusion is that if you take Paul  
7     Tagliabue, is that when Comcast couldn't get  
8     the exclusive rights, that they were trying to  
9     say, they wanted the eight game package as  
10    part of Versus exclusively so that Comcast  
11    could sell it to other MVPDs; that's what the  
12    fight was about.

13                And when NFL decided no, I'm not  
14    going to give you the rights exclusively. I'm  
15    going to carry my own network, and I'm going  
16    to broadcast those rights on my own network,  
17    called the NFL Network, the threat came back  
18    was, the cable industry is going to get you.  
19    It wasn't, Comcast is going to retaliate.  
20    It's the cable industry is going to get you.  
21    And just to follow the logic is that Comcast  
22    called up Time Warner. If you follow all the



1 logical steps, and said, guys, we need to ice  
2 out the NFL for that decision.

3 Now setting that aside, okay, I  
4 still consider Time Warner's carriage  
5 decision. I don't want to close my eyes to  
6 Time Warner's decision, despite all that  
7 evidence suggesting that this decision was  
8 made jointly with Comcast. I say, you know  
9 what, set that aside; let's just calculate a  
10 fair market penetration test. And give Time  
11 Warner its weight, its weight is by the number  
12 of subscribers that he has. And then market  
13 penetration test it. And I still find that  
14 over half the MVPDs, when stated on a  
15 weighted, on a subscriber weighted basis,  
16 carry the NFL Network.

17 So I don't want to disregard what  
18 Time Warner did. I just want you guys to know  
19 the caveats that are weighing in my mind when  
20 I make that decision. In other words I think  
21 I'm being very conservative and fair to  
22 Comcast when I incorporate Time Warner's

1 decision not to carry into my market  
2 penetration test.

3 BY MR. SCHONMAN:

4 Q As an economist, do you have any  
5 expertise in why cable companies will shift a  
6 program from one tier to another? Are you the  
7 right person to ask about that?

8 A Well, I've written papers on  
9 vertical foreclosure theories. I've been  
10 involved in many carriage disputes.

11 I think what's going on, what  
12 explains the first exhibit in my direct  
13 testimony, is pure favoritism. In other words  
14 if you are an independent network, you are  
15 going to the outhouse, you are going to be  
16 relegated to the sports tier.

17 JUDGE SIPPEL: If you are what?

18 THE WITNESS: If you are an  
19 independent network. Remember, when we put up  
20 that exhibit that showed where Comcast puts  
21 its national sports network. And there was a  
22 lot of - and the line explained everything.

1 If you were affiliated you were above the  
2 line; you got on the expanded basic. If you  
3 were unaffiliated you were below the line.  
4 And there were the two exceptions, remember,  
5 ESPN and MASN.

6 BY MR. SCHONMAN:

7 Q Well, how many were above the  
8 line? Why don't we look at the exhibit. That  
9 might be easier.

10 JUDGE SIPPEL: What is the  
11 exhibit number?

12 MR. SCHONMAN: That's Enterprise  
13 Exhibit 191.

14 JUDGE SIPPEL: By the way, before  
15 - I'd like to - I take it you are moving in  
16 Comcast Exhibit 426.

17 MR. BURKE: That is correct.

18 JUDGE SIPPEL: Which is the Hal  
19 Singer article?

20 MR. BURKE: Yes, we are, Your  
21 Honor.

22 JUDGE SIPPEL: Any objection to

1     that, sir?

2                   MR. SCHMIDT:    No, Your Honor.

3                   JUDGE SIPPEL:   That is received  
4     into evidence, Comcast Exhibit No. 426 is  
5     received into evidence as Comcast Exhibit No.  
6     426.

7                   (Whereupon the aforementioned  
8     document having bee previously  
9     marked for identification as  
10    Comcast No. 426 was received into  
11    evidence)

12                  MR. SCHONMAN:   Dr. Singer, you  
13    have a poster which is Enterprise Exhibit No.  
14    191 in front of you.  And if I understand your  
15    testimony a moment ago you said that by and  
16    large independent programmers get relegated to  
17    a higher tier?

18                  THE WITNESS:    National sports  
19    programmers, right.  And the theory that I'm  
20    offering is the notion that this decision is  
21    being driven by Comcast vertical integration  
22    into the same type of programming.  That is,

1 if you didn't see this vertical integration,  
2 you might not see the same pattern emerge.

3 BY MR. SCHONMAN:

4 Q But that is not a hard and fast  
5 rule, because as you indicated, there are  
6 exceptions.

7 A There are two exceptions on board  
8 with 15 odd observations. And they are  
9 important exceptions, but I think there are  
10 very plausible explanations for why.

11 Remember, the MASN example was a  
12 case that I was personally involved in. It  
13 was a discrimination case, that was resolved  
14 in favor of MASN.

15 Q But there were two exceptions not  
16 in a crowd of did you say 50, there are two  
17 exceptions in a crowd of six. In other words  
18 one-third of the independents are not on the  
19 premium sports tier; they are on the expanded  
20 basic tier. And you are counting MASN as one  
21 of those?

22 A Yes, and I just want to say that

1 without regulatory intervention by the FCC you  
2 would not see MASN there.

3 Q So we should disregard MASN?

4 A Well, I think it's a very  
5 important story. I think in fact the MASN  
6 story tells you exactly what's going on here.

7 Q Well, if we disregard MASN then we  
8 have two out of five, so now the percentage of  
9 independents above the line just went up, no?  
10 Is that - am I misreading?

11 A Well, you are counting ESPN and  
12 ESPN II as separate. But ESPN would bundle  
13 its programming when it negotiates with  
14 Comcast, so that decision was made all at  
15 once. So basically what you are seeing is  
16 that every - the point I was trying to make is  
17 that every - here are the statistics if you  
18 will. What percentage of Comcast-affiliated  
19 networks make it above the line? One hundred  
20 percent. And then what percentage of  
21 independent networks make it above the line?  
22 And I'd say it's one over 15, right? You

1 follow the math?

2 Q Yes.

3 A Those are the two takeaways.

4 Q This is just Comcast, correct?

5 Exhibit 191?

6 A Correct.

7 Q And this would vary from carrier  
8 to carrier, and by carrier I mean a cable  
9 company or - a cable company?

10 A A MVPD? Sure, so if we were  
11 looking at - we already know that NFL Network  
12 wouldn't appear below the line if we were  
13 looking at DIRECTV, EchoStar, right, all the  
14 Comcast in-region rivals, Verizon, AT&T; NFL  
15 would be on a highly penetrative tier.

16 Q I had asked you earlier what are  
17 the reasons from your experience why cable  
18 companies will move a channel to a higher  
19 tier, and you gave me one so far, because of  
20 the vertical integration.

21 What other reasons are there?

22 A So let's take the case of a non-

1 vertically integrated firm, and so this is  
2 important way to distinguish this hypothetical  
3 from the conflict that causes us all to be in  
4 the room today.

5 Now I cannot say that the tiering  
6 decision by non-vertically integrated  
7 preferred (phonetic) was driven by, for  
8 reasons of affiliation, right? Now it's  
9 presumably because that is the profit  
10 maximizing choice of the MVPD.

11 Q In other words the cost?

12 A Well, in other words the - it's  
13 not just cost; it's a combination of cost and  
14 value, right? And what your in-region rivals  
15 are doing. We just went through this example  
16 where WOW didn't do it.

17 So I think that for a non-  
18 vertically integrated carrier you can make  
19 different inferences about why they would have  
20 tiered an independent network.

21 Q Is it your testimony, then, that  
22 for a non-vertically integrated entity, there



1 are multiple reasons why that type of entity  
2 might move a program to a different tier?

3 A Correct.

4 Q For a vertically integrated entity  
5 is it your testimony that price is the only  
6 criteria?

7 A No, in fact for a vertically  
8 integrated carrier, what I am concerned about,  
9 what the cable act is concerned about, what  
10 all this FCC body of regulations is concerned  
11 about, is that the decision is driven purely  
12 on the basis of affiliation.

13 Q So it is your testimony then that  
14 affiliation drives the determination for a  
15 vertically integrated entity as to where to  
16 place a particular program?

17 A Yes, with the caveat of a  
18 vertically integrated carrier who is pursuing  
19 an anticompetitive foreclosure strategy, yes.

20 Q So that presumes they are pursuing  
21 that strategy?

22 A Sure, we are trying to distinguish

1 between a pro-competitive hypothesis here and  
2 an anti-competitive hypothesis.

3 Q And I am trying to glean  
4 everything I can from your testimony, and I'm  
5 struggling with this. If you have a  
6 vertically integrated entity that is not  
7 pursuing that strategy, what are the reasons  
8 then why that type of entity might move a  
9 program from one tier to another?

10 A If we know that he is not pursuing  
11 the anti-competitive strategy.

12 Q Correct.

13 A Then the only other thing we have  
14 is that he is doing it for pro-competitive  
15 reasons, right? So presumably it's more  
16 profitable to him to put it on the tier.

17 Q How do we determine whether an  
18 entity has this strategy or doesn't have this  
19 strategy?

20 A We bring in an economist, and we  
21 look at the background too. The MASN case and  
22 this case have something very important that

1 I would like everyone to focus on, and what I  
 2 have written on extensively, and what I've  
 3 been involved in personally, a lot of cases.  
 4 It starts off with a threat. It says, we want  
 5 your content to put on our affiliated network,  
 6 and if you don't give it to us, we are not  
 7 going to carry your network any longer.

8 This is the factual backdrop of  
 9 Time Warner CSET, for the Time Warner C-SET  
 10 conflict in North Carolina. It was the  
 11 factual backdrop of the Time Warner C-SET, by  
 12 the way, Your Honor, is C dash S-e-t, and I  
 13 write about it in my testimony.

14 It's the factual backdrop to the  
 15 Time Warner MASN case, TCR v. Time Warner.  
 16 It's the factual backdrop to Comcast-MASN.  
 17 And it's the factual backdrop to NFL-Comcast.  
 18 It all begins with this threat. We want your  
 19 programming. We want an equity interest in  
 20 the programming, which is directly in  
 21 violation of the cable act's protections.

22 And if you don't take it, if you

1 don't give it to us, then we are not going to  
2 carry you.

3 So I don't want us to ignore this  
4 important factual background. You don't need  
5 a Ph.D. in economics to see what is going on  
6 here.

7 Q Well, you have characterized it as  
8 a threat, but I have also heard some  
9 discussion today and yesterday as well about  
10 hard core negotiations, which I don't think  
11 could be characterized as nefarious for any  
12 reason.

13 What would make that a threat  
14 rather than just good bargaining?

15 A It's because you cannot say that I  
16 want equity in your program as a condition of  
17 carriage. You can't do that. You don't need  
18 a law degree to be able to read that line out  
19 of the cable act. And that is what Comcast in  
20 fact is doing here. It's what it did in  
21 Washington. The FCC smelled it out in  
22 Washington.

1           Q       Is that a conclusion that you are  
2 drawing as an economist? Or do you have  
3 personal knowledge that that is what has  
4 happened?

5           A       Well, I can't add anything more to  
6 what Paul Tagliabue said the threat was. I  
7 can't add - you have that in the record. I  
8 can't add - as an economist I can't do  
9 anything with that.

10                   This was my evidence of  
11 discrimination on the basis of affiliation.

12           Q       No, but a moment ago you were -  
13 the predicate you were starting with is that  
14 there was this threat, and my question is, is  
15 that an observation you are making as an  
16 expert economist? Or is that something that  
17 you have personal knowledge of?

18           A       Well, I never have personal  
19 knowledge in the sense that I wasn't there for  
20 the negotiations. But the way that I  
21 interpret this negotiation as an economist is  
22 that Comcast built in a tiering right, and

1    what that tiering right gave it, right, was  
2    the ability to inflict pain on NFL when NFL  
3    decided not to give its programming on an  
4    exclusive basis to Comcast.

5                   As soon as it did that, as soon as  
6    Comcast learned that Comcast was not going to  
7    get the eight-game package on Versus, right,  
8    the punishment immediately kicked in.

9                   Now that is my reading of the  
10   facts as an economist.

11           Q       Comcast built that into the  
12   contract?

13           A       Well, it built it into - I think  
14   it built it into the negotiations. And there  
15   is a tiering provision in the contract, as  
16   well, but there is a dispute as to the rights  
17   under which Comcast could invoke that tiering  
18   obligation. I want to steer clear of that.

19           Q       Understood.

20                   I just want to take a few more  
21   minutes to revisit some statements you made in  
22   your direct written testimony; that's

1 Enterprise Exhibit No. 189.

2 A Okay.

3 Q This will just take a few minutes.

4 A Paragraph 189?

5 Q No, Exhibit 189. It's your  
6 direct. It's Enterprise Exhibit No. 189, your  
7 voluminous exhibit.

8 A I've got it.

9 JUDGE SIPPEL: The direct  
10 testimony of Dr. Hal Singer. Highly  
11 confidential.

12 MR. SCHONMAN: Just a few  
13 questions.

14 BY MR. SCHONMAN:

15 Q If you would turn your attention  
16 to paragraph six through eight for example.  
17 And in these paragraphs you are talking about  
18 the NFL being - I don't want to  
19 mischaracterize your testimony here - but  
20 substantially more popular than Versus and  
21 Golf networks, correct?

22 A Yes.

1           Q       Okay. If the NFL Network is  
2 substantially more popular than those two  
3 channels, those two networks, does that  
4 diminish any conclusions you draw about  
5 whether they are similarly situated?

6           A       No, in fact the FCC in its order  
7 on reconsideration in TCR v. Time Warner,  
8 pointed to the disparity in popularity between  
9 MASN and Time Warner's affiliated program as  
10 evidence that right in the section called  
11 finding of discrimination and the subsection  
12 on similarly situated they said that this is  
13 evidence that if you are more popular that we  
14 can infer that your demand is equal to or  
15 greater than the demand of the affiliated  
16 network.

17                   Now I think we are going - if it  
18 is so much more popular, can that actually  
19 move it outside or too far away, or start to  
20 violate the similarly situated.

21           Q       Yes, that was my question.

22                   MR. BURKE: I would move to



1 strike the witness' answer as legal  
2 interpretation of an FCC decision, not  
3 economic testimony.

4 JUDGE SIPPEL: Well, I'll accept  
5 it as lay testimony; it won't be expert  
6 testimony.

7 THE WITNESS: And all of that,  
8 what I just said, is contained in my written  
9 testimony as well. I quote back the FCC and  
10 its words.

11 MR. SCHONMAN: I think we are all  
12 in agreement that NFL is more popular than  
13 hockey. I don't think we are going to get  
14 into a big fight over that. And I've heard  
15 bull fight and I've heard hockey.

16 THE WITNESS: Hockey is the best  
17 that Versus has. And then you have bull  
18 riding and cage fighting and all these other  
19 things, deer hunting and stuff like that. And  
20 I don't want to offend anybody who is a deer  
21 hunting fan.

22 JUDGE SIPPEL: Be very careful

1 with deer hunting. I had some experience with  
2 that. I'm not a deer hunter, but be very  
3 careful.

4 THE WITNESS: And I don't want to  
5 offend any hockey fans, either. But I think  
6 it's fair that football is more popular than  
7 hockey. I think that if you are to draw a  
8 line, I've also I think it's pretty accepted  
9 in the industry that there are four major  
10 professional sports, there are -

11 JUDGE SIPPEL: What industry are  
12 you talking about?

13 THE WITNESS: The sports  
14 industry.

15 JUDGE SIPPEL: Sports industry in  
16 the sense of broadcasting industry? Or the  
17 sports industry in some other sense?

18 THE WITNESS: Well, both. I mean  
19 the popularity will reflect in the  
20 broadcasting industry as well. But there are  
21 four professional team sports that are, I  
22 think are considered to be the most important